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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL LEE CRUZ,

Defendant and Appellant.

E048247

(Super.Ct.Nos. SWF013474
& SWF023218)

OPINION

APPEAL from the Superior Court of Riverside County. Richard J. Hanscom, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Michael Lee Cruz was convicted by a jury in case No. SWF023218 of one count of sexual battery with restraint (Pen. Code, § 243.4, subd. (a))¹ and one count of a lewd and lascivious act on a child (§ 288, subd. (c)(1)). Based on the same allegations and evidence presented at the trial in case No. SWF023218, the trial court also found defendant violated the conditions of his probation in case No. SWF013474.² He now appeals the jury's verdict and the trial court's findings in each of these cases because he contends there was insufficient evidence to support the unlawful restraint element of the sexual battery offense. (§ 234.4, subd. (a).) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The victim in this case was a 15-year-old girl who was babysitting on September 29, 2007, in the home where defendant lived with his girlfriend and four small children. The victim testified she went to the home about 7:30 a.m. to babysit the children. At that time, defendant's girlfriend was there and defendant was at work. Defendant's girlfriend left the home about 10 or 15 minutes after the victim arrived to babysit.

Defendant came home about 12:30 or 1:00 p.m. The children were playing nearby, and the victim was sitting on the couch. Defendant sat on the couch with the

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² In case No. SWF013474, defendant pled guilty to possession of a weapon commonly referred to as a "billy club" in violation of section 12020, subdivision (a). Two other counts were dismissed and defendant was granted probation for a period of three years, subject to various terms and conditions, including 120 days in jail on weekends. One of the conditions of defendant's probation required him to "obey all laws."

victim and told her how good she looked. These comments about her looks were similar to other comments he made to her on previous occasions when she babysat, but she did not pay much attention to them. This time, he also told her he wanted to have sex with her.

A few minutes later, the victim got up and went to the kitchen to make the baby's bottle. Defendant followed and went up to her from behind. He brushed up against her back side for a couple of seconds, and she felt an erection. She told him to stop and pushed him away. He stopped and went outside for a cigarette. She finished making the baby's bottle and sat back down on the couch. Defendant returned and sat down next to her on the couch and continued making comments about her appearance. He also told her he thinks about her "when he jacks off." He then leaned over her, felt her leg, and touched her vaginal area. After that, he sat back down on the couch and continued making comments about her body. The victim did not try to leave the house at this point because she was scared and had not been paid for babysitting.

After sitting back down on the couch, defendant leaned on top of the victim, pulled her shirt down, and started sucking on the nipple area of her left breast. She told him to stop and tried to pull him off of her "but he wouldn't get off." She pushed on his chest for a couple of seconds, and he stopped. She got up and left the house, closing the door behind her. Defendant followed, told her to come back, and said "he didn't know that [she] didn't want him to do that." She just kept walking and went home; she told her grandmother and her parents what happened. They took her to the police station. While she was at the police station, she saw defendant's car drive by, make a U-turn, and leave.

After the victim was interviewed by police, forensic technicians prepared swabs of the victim's breast, bra, and shirt for testing. Police also drew a sample of defendant's blood. Samples taken from the victim's bra were inconclusive for the presence of saliva, but a DNA analysis of a bra sample matched a reference sample taken from defendant.

During direct examination, the victim testified she had also been sexually assaulted by her brother's friend when she was 11 years old. She identified her friend Alicia as a witness. Defendant presented evidence indicating the victim's friend denied witnessing the assault. In addition, defendant attacked the victim's credibility with testimony suggesting she had a reputation for exaggerating and being dramatic. There was also testimony suggesting she had not been truthful about the prior sexual assault.

In case No. SWF023218, the jury convicted defendant of count 1, sexual battery with restraint (§ 243.4, subd. (a)), and count 2, lewd and lascivious act on a child (§ 288, subd. (c)(1)). The trial court sentenced defendant to two years in state prison. In addition, the trial court found defendant violated his probation in case No. SWF013474, and sentenced him to one year four months in state prison to be served concurrently with the term imposed in case No. SWF023218.

DISCUSSION

Defendant contends the evidence presented during trial is insufficient to support the restraint element of a sexual battery under section 243.4, subdivision (a), because it does not show he frightened the victim, deprived the victim of her liberty, or used any more force than necessary to commit the unwanted touching. To support his contention the victim was not frightened, defendant cites her testimony that he made sexual

comments to her in the past, but she did not take them seriously. He also points to circumstances indicating she had the opportunity to leave the home after the first touching incident in the kitchen but did not do so. He further claims there is no evidence to show he physically prevented the victim from leaving or to show he used his authority as an adult or employer to control the victim by threatening to tell her parents or to withhold her pay.

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) “In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

“Any person who touches an intimate part of another person while that person is unlawfully restrained . . . and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery.” (§ 243.4, subd. (a).) In section 243.4, subdivision (f), the term “touches” is defined as “physical contact with the skin of another person whether accomplished

directly or through the clothing of the person committing the offense.” “ ‘Intimate part’ means the sexual organ, anus, groin, or buttocks of any person, and the breast of a female.” (§ 243.4, subd. (g)(1).)

“[T]he unlawful restraint required for violation of section 243.4 is something more than the exertion of physical effort required to commit the prohibited sexual act.”

(*People v. Pahl* (1991) 226 Cal.App.3d 1651, 1661.) “[A] person is unlawfully restrained when his or her liberty is being controlled by words, acts or authority of the perpetrator aimed at depriving the person’s liberty, and such restriction is against the person’s will.” (*People v. Arnold* (1992) 6 Cal.App.4th 18, 28.)

Viewed in the light most favorable to the judgment, our review of the record reveals enough evidence to support the jury’s finding of a sexual battery involving an unlawful restraint. The victim was vulnerable because of her young age and because she was babysitting small children inside defendant’s home, where she was isolated from anyone who could assist her. As an adult and a parent in the home where she had been hired to babysit, defendant was an authority figure. Although it is true defendant made comments of a sexual nature to the victim on prior occasions and she did not take them seriously, this time was quite different because his sexual advances toward her progressed to a sexually charged touching in the kitchen. It is understandable the victim would be confused and afraid by the escalation in defendant’s advances and be unsure what to do. She was faced with conflicting information—defendant’s prior advances were verbal only and on this occasion he did stop when told to do so during the initial physical encounter in the kitchen.

As defendant contends, the evidence does suggest the victim was not under defendant's physical control after the initial touching in the kitchen, and she could have simply left the home while defendant was outside smoking a cigarette. However, because she went back to the sofa after making the baby's bottle and while defendant was apparently still outside, the jury could reasonably infer she did not believe her responsibilities toward the children were over for the day. She testified she was scared and had not yet been paid for her work. Instead of respecting her expressed desire not to consent to his advances, defendant approached her again in a more forceful and invasive manner. The victim testified defendant leaned on top of her, pulled her shirt down, and started sucking on the nipple area of her left breast. She told him to stop and tried to pull him off of her "but he wouldn't get off." She pushed on his chest for a couple of seconds, and he stopped.

Under these circumstances, we conclude there is sufficient evidence in the record to support the unlawful restraint element of a sexual battery in violation of section 243.4, subdivision (a). A jury could reasonably infer defendant unlawfully restrained the victim because he created a coercive atmosphere and used isolation and his status as an authority figure, as well as excessive force, to deprive the victim of her liberty.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

McKINSTER
J.